IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

In re:	)	
	)	**Case No. 10-31607**
GARLOCK SEALING TECHNOLOGIES LLC, et al.,	)	**Chapter 11**
	)	**(Jointly Administered)**
Debtors.[1]	)	

THE FUTURE ASBESTOS CLAIMANTS' REPRESENTATIVE'S
MOTION FOR AN ASBESTOS CLAIMS BAR DATE AND RELATED RELIEF

[1] The Debtors are Garlock Sealing Technologies LLC ("Garlock"), Garrison Litigation Management Group, Ltd. and The Anchor Packing Company.

TABLE OF CONTENTS

Page

I. SUMMARY 1
II. JURISDICTION 4
III. LEGAL BASIS FOR RELIEF REQUESTED 4
IV. BACKGROUND 4
A. Garlock's Asbestos History 5
B. The Debtors' Bankruptcy Filing and Appointment of the ACC and the FCR 7
C. The Debtors' Prior Bar Date Motions for Asbestos Claims 11
D. The Court's Estimate of Garlock's Mesothelioma Claims 15
E. The Debtors' Bankruptcy Plan 16
F. The Settled Claims Bar Date 16
G. The Broken Promise of Asbestos Trusts 17
H. The Debtors' Voting Solicitation Procedures and Notice Program 21
V. LEGAL ARGUMENT 22
A. Scope of Bar Date 23
B. Form of Proof of Claim 24
C. Notice of Bar Date 24
D. Entry of Bar Date 25
VI. CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases

In re A.H. Robins Co.,
862 F.2d 1092 (4th Cir. 1988) 4, 22, 24

Amchem Products, Inc. v. Windsor,
521 U.S. 591 (1997)....................10

In re Babcock & Wilcox Co.,
No. 00-0558, slip op. (E.D. La. Oct. 30, 2000)....................22, 24

In re Dow Corning Corp.,
211 B.R. 545 (Bankr. E.D. Mich. 1997)....................22

Grady v. A.H. Robins Co. (In re A.H. Robins Co.),
839 F.2d 198 (4th Cir. 1988) 9

In re Hooker Invs., Inc.,
937 F.2d 833 (2d Cir. 1991)....................22

JELD-WEN, Inc. v. Van Brunt (In re Grossman's Inc.),
607 F.3d 114 (3d Cir. 2010)....................9

In re Keene Corp.,
188 B.R. 903 (Bankr. S.D.N.Y. 1995)....................22

In re USG Corp.,
290 B.R. 223 (D. Del. 2003)....................22

Vancouver Women's Health Collective Soc'y v. A.H. Robins Co.,
820 F.2d 1359 (4th Cir. 1987) 22

In re W.R. Grace & Co.,
No. 01-01139, (Bankr. D. Del. Aug. 24, 2006) 22, 25

Statutes

11 U.S.C. § 1126(a) 10

28 U.S.C. § 157....................4

28 U.S.C. § 1334....................4

Medicare, Medicaid, and SCHIP Extension Act of 2007, Pub. L. No. 110-173,
§ 111, 121 Stat. 2492, 2497-00....................8

Rules

Fed. R. Bankr. P. 3003 .... 4, 24

Fed. R. Bankr. P. 9009 24

Other Authorities

S. Elizabeth Gibson, Judicial Management of Mass Tort Bankruptcy Cases 72 (Federal Judicisl Center 2005) 22

S. Todd Brown, How Long is Forever This Time? The Broken Promise of Bankruptcy Trusts. 61 Buff L. Rev. 537 (2013) 18, 19, 20

Joseph W. Grier, III, the future asbestos claimants' representative (the "FCR"), through counsel, hereby moves for entry of an order establishing a bar date for asbestos claims asserted against the Debtors, and approving the proof of claim form and the form and manner of notice of the bar date. In support of this motion, the FCR states as follows:

I. SUMMARY

The Bankruptcy Rules mandate entry of a bar date. They do so for good reason. A clear understanding of the volume, nature, and amount of current claims is necessary for a critical examination of any plan of reorganization, both by courts and interested parties.

The need for bar dates in asbestos cases is even more acute. In those cases, current and future asbestos claims are commonly enjoined and channeled to trusts with limited assets. If projections for current claims prove to be inaccurate because a bar date was not entered, trust assets are diluted early on by unexpected numbers of current claims. There are then insufficient funds to pay future claims the same recovery. Such disparate treatment violates a fundamental bankruptcy principle: that similarly situated creditors receive the same recovery. Unfortunately, the failure to accurately project current claims is the rule, not the exception. As a result, multiple asbestos trusts have had to reduce payments to future claimants, often dramatically.

While entry of a bar date is mandated, bankruptcy courts have the discretion to fix the bar date at a time that is appropriate for each case. Exercising that discretion, this Court has already set bar dates for non-asbestos claims and settled asbestos claims in this case. It is true that the Court previously denied two requests from the Debtors for a general asbestos claims bar date. But the Court only did so because the requests were premature. The Court emphasized that the denials were without prejudice and a bar date motion could be presented at a "later stage in these cases," i.e., when entry of a bar date was appropriate.

The "later stage of these cases" has arrived. The parties have engaged in extensive discovery concerning the scope of the Debtors' mesothelioma liabilities and the Court, following a 17-day trial, has estimated those mesothelioma liabilities. Furthermore, the Debtors have filed a plan of reorganization that channels current and future asbestos claims, across all disease categories, to settlement and litigation trusts, each with limited assets. Thus, a bar date must be entered to understand how many claims will be asserted against those trusts.

To be sure, the Court has information from some mesothelioma plaintiffs who completed personal injury questionnaires ("PIQs") earlier in the case. But the PIQs, by design, are not binding and enforceable. Nor do they represent the full universe of current mesothelioma plaintiffs. Many plaintiffs in the Debtors' database did not to respond to the PIQs; others did not identify exposure to asbestos fibers from Garlock's products; and the PIQs did not pick up mesothelioma claims for victims who became ill post-petition, i.e., over the last four and a half years. So the Court is in the dark as to how many valid mesothelioma claims exist and will be asserted.

Making matters worse, the Court has no reliable information concerning non-mesothelioma claims of which, according to the Debtors' database, there are 100,000 in number. A large percentage of those claims date back many years and may never be asserted against the Debtors. But if they are to be asserted, the Court and the parties need to know now, not after the trusts are up and running and have paid claims. At that juncture, it is too late.

At bottom, without greater certainty as to the actual number of current claims to be asserted against the Debtors across all disease categories, the various requirements for confirmation of the Debtors' Plan (or any other party's plan) cannot be satisfied. Therefore, entry of a bar date is now appropriate.

The noticing of the bar date can be easily and quickly accomplished at no additional expense. The Debtors are already asking for approval of a robust and costly notice program, to be conducted by an expert notice agent, for voting on and confirmation of the Debtors' Plan. In fact, the Debtors' ballots require current claimants to identify themselves, their disease, and evidence of exposure. It would be a simple matter to amend the notice to include notice of the bar date. If a bar date notice is not sent out now, it will need to be sent later, at an additional and unnecessary expense. Assuming no unreasonable delay, the bar date can be the same as the date ballots have to be submitted, which will be at least six months from now.

The information required for a proof of claim should not be burdensome for claimants. At a minimum, however, the claim should identify the claimant, the disease, and exposure to the Debtors' product. A claimant's diagnosis of his disease should be attached to his form. Part 5 of the PIQ provides a model for exposure requirements. Confidential information – full social security numbers and medical information – must be appropriately protected. Otherwise, the Court's regular protocols for filing proofs of claim, which are presumptively non-burdensome, will be followed.

The bar date should apply to known claimants – for whom the Debtors already have contact information – and individuals with exposure to fibers in Garlock's asbestos-containing products who manifested a disease after the petition date but up to a date six months prior to entry of the bar date order. That will identify most current claimants while not unfairly prejudicing individuals who only recently manifested a disease or who have no disease at all and therefore would not know that they had a claim.

Finally, entry of a bar date will not trigger thousands of allowance proceedings. The bar date will identify the current claimants who intend to actually assert claims against any trust created in this case but the trusts will process current claims that were filed by the bar date.

II. JURISDICTION

The Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b).

III. LEGAL BASIS FOR RELIEF REQUESTED

Bankruptcy Rule 3003(c)(3) provides that "[t]he court shall fix" the bar date but, "for cause shown" may extend the "time within which proofs of claim or interest may be filed." Fed. R. Bankr. P. Rule 3003(c)(3) (emphasis added). Thus, while courts have full discretion as to when they set a bar date, they must do so. Bankruptcy Rule 3003(c)(2) further requires that creditors whose claims are disputed "shall file a proof of claim" by the bar date. Id. 3003(c)(2) (emphasis added). The Debtors have scheduled all asbestos claims that were pending on the petition date as disputed. Any disputed claimant who fails to file by the bar date "shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution." Id. (emphasis added). The requirements of Rule 3003 have been recognized by the Fourth Circuit in the seminal case of In re A.H. Robins Co., 862 F.2d 1092, 1095 (4th Cir. 1988).

IV. BACKGROUND

Much of the background that follows, which is directly relevant to this motion, will be very familiar to Judge Hodges and is drawn from the Estimation Order. It is presented here in light of the transfer of the cases to Judge Whitley.

A. Garlock's Asbestos History

Garlock and its predecessors manufactured and sold asbestos-containing industrial sealing products throughout the United States from early in the twentieth century until 2001. Garlock's asbestos products, which ranged from small cans of asbestos packing to rolls of gasket material, were used in many different settings, including pipes, boilers, engines, and valves. They were sold to a full gamut of customers in a variety of industries, including shipping, oil, chemical, steel, mining, and water treatment. The products, which were often stamped with Garlock's name and logo, were so ubiquitous that the term "Garlock" was synonymous with gaskets; they were the "Kleenex" of their market. The asbestos used in Garlock's products was largely chrysotile; some products, however, contained the more toxic crocidolite asbestos.

The majority of Garlock's asbestos products were encapsulated in rubber or other binders. This is to be compared to friable asbestos-containing products, such as insulation, which Garlock did not manufacture and can crumble and release asbestos fibers relatively easily. As this Court found, and the parties do not dispute, "it is only when the [Garlock] gaskets were cut, hammered, scraped, brushed or abraded that they could generate breathable asbestos fibers." Order Estimating Aggregate Liability, Jan. 10, 2014, ¶ 26 (Dkt. No. 3296) ("Estimation Order").

Workers engaged in or near such activities were at the greatest risk of being exposed to asbestos fibers from Garlock products. Those workers would include industrial pipefitters, steamfitters, plumbers, Navy machinist mates, and boilermakers. Workers that manufactured gaskets from sheet material using shears and saws had higher exposures than end users of the gaskets. Estimation Order, ¶ 37.

Exposure to asbestos fibers is known to cause mesothelioma, a fatal disease. Asbestos fibers are also linked to other cancers, including lung cancer (although smoking history can be a confounding factor) and certain non-malignant diseases, such as asbestosis.

There is a dose response element to the development of asbestos diseases. For example, as the Court found with regard to mesothelioma, "[a] higher and more prolonged dose of asbestos increases the chance of developing the disease." Id. ¶ 15. There are also long latency periods between first exposure to asbestos and the development of a disease. Mesothelioma, for example, rarely develops in less than ten years and the median latency period is around 35 years. Id. ¶ 16.

As of the Petition Date, the following asbestos claims were pending against Garlock: 4,000 mesothelioma claims; 2,000 other cancer claims; 6,500 lung cancer claims; and 83,000 non-malignant and unknown disease claims. See Debtors' Demonstratives for Hearing on Notice for Plan Solicitation and Confirmation, Nov. 17, 2014 ("Debtors' Demonstratives"), at 20.

"The vast majority of Garlock's pending non-malignant claims were filed prior to tort and judicial reform in the mid-2000s that relegated non-malignant claims to inactive dockets." Debtors' Motion for (A) Establishment of Asbestos Claims Bar Date, (B) Approval of Asbestos Proof of Claim Form, (C) Approval of Form and Manner of Notice, (D) Estimation of Asbestos Claims, and (E) Approval of Initial Case Management Schedule, Aug. 31, 2010 (Dkt. No. 461) ("First Bar Date Motion"), at 10 (emphasis omitted). The Debtors assert that these "[non-malignant] claims would not have qualified for compensation under applicable state law and Garlock would have never paid them unless they subsequently developed a disease." Id. There are also "approximately 37,000 pending claims that do not allege any type of asbestos disease or condition, approximately 36,000 of which were filed before January 1, 2006." Id. at 11.

While mesothelioma claims are in the minority in number, they represent by far the largest group in dollar amount. From 2008 until 2010 (when the Debtors filed for bankruptcy), 85 to 87 percent of all indemnity payments made by the Debtors went to mesothelioma claims. Debtors' Demonstratives, at 22. This is a function of, among other things, the fact that mesothelioma is always fatal and asbestos fibers are a known cause of that disease. "Because of the relative overwhelming magnitude of mesothelioma claims in comparison to other claims based on other diseases," this Court ordered that the estimation proceeding would only focus on mesothelioma claims. Estimation Order, ¶ 9. As a consequence, while the Court has certain, but incomplete, information concerning mesothelioma claims, it has no reliable information concerning other disease claims.

Various verifiable and objective factors impact the value of an asbestos plaintiff's claim. For example, a younger, living, married claimant, suffering from mesothelioma, with dependents, significant financial losses in the future (earnings, pension, social security, etc.), large medical expenses, and extended exposure to asbestos fibers from primarily one company's products will have a strong claim. An older, single, deceased, lung cancer claimant (where smoking is a confounding cause of the disease), with no dependents, and no evidence of exposure will have a weak claim. The ability of a trust to evaluate these factors, transparently and objectively, permits a fair allocation of trust funds to claimants, both present and future.

B. The Debtors' Bankruptcy Filing and Appointment of the ACC and the FCR

In June 2010, Garlock and its affiliates – the Debtors – filed their bankruptcy petitions. Their goal is to confirm a reorganization plan that enjoins all current and future asbestos claims against the Debtors and channels them to a trust for payment pursuant to court-approved trust distribution procedures ("TDP"), also referred to by the Debtors as claim resolution procedures ("CRP").

The Court later appointed the Asbestos Creditors' Committee (the "ACC") to represent the interests of current asbestos claims. Order Appointing Official Committee of Asbestos Personal Injury Claimants, June 16, 2010 (Dkt. No. 101). The members of the ACC are plaintiffs represented by prominent plaintiff law firms. See Amended Order Appointing Official Committee of Asbestos Personal Injury Claimants, July 20, 2010 (Dkt. No. 260).

The plaintiff firms in general represent individuals with claims against Garlock and multiple other defendants, both solvent and insolvent. It is common for asbestos complaints to name 30 to 100 defendants. Most current claimants in the tort system will have contingency fee arrangements with their counsel, often providing for payment of up to 40% of a claimant's gross recovery to counsel. After paying counsel fees, settling plaintiffs who received Medicare benefits may then be liable to the Government for reimbursement of those medical costs out of their settlements. See Medicare, Medicaid, and SCHIP Extension Act of 2007 ("MMSEA"), Pub. L. No. 110-173, § 111, 121 Stat. 2492, 2497-00. It is in the best interests of current claimants (and their counsel) to get paid on their claims as much and as quickly as possible.

Still later, Joseph W. Grier, III was appointed by this Court as the FCR to represent the interests of the holders of future asbestos personal injury claims against Garlock. Order Granting Debtors' Motion for Appointment of Joseph W. Grier, III as Future Claimants' Representative, Sept. 16, 2010 (Dkt. No. 512) ("FCR Appointment Order"), ¶ 2. The Debtors chose Mr. Grier to be the FCR. Mr. Grier has never been involved in an asbestos bankruptcy case and has also never represented an asbestos plaintiff in a personal injury action. The Appointment Order defines the FCR's constituency – "future asbestos claims" – as "claims based on, arising out of, or related to asbestos-related injury, disease, or death that has not manifested, become evident, or been diagnosed as of the date an order is entered confirming a plan of reorganization in these cases." Id.

The parties in this case agree that individuals will assert asbestos-related claims against Garlock for the next 35 years or so. Although they disagree as to scale, each party's estimation expert predicts, as of the Petition Date, that the FCR's clients represent more than 75% of all mesothelioma claims. For example, the Debtors' expert, Dr. Bates, predicts 2,177 present and 16,807 future mesothelioma claims. See FCR's Post-Trial Brief Regarding the Estimation of Garlock's Mesothelioma Claims, Nov. 1, 2013 (Dkt. No. 3195), at 4. A similar ratio would hold true for other asbestos disease claims. All parties agree, and the Court has so found, that future asbestos claimants, as a group, remain by far the largest creditor constituency in the case.

Most, if not all, future claims will be based on prepetition exposure to asbestos fibers released from Garlock's products. Thus, those claimants, though unknown because their diseases have not yet manifested, are formally categorized as "claims" under Fourth Circuit precedent. See Grady v. A.H. Robins Co. (In re A.H. Robins Co.), 839 F.2d 198, 203 (4th Cir. 1988) (holding that a tort "claim" related to the prepetition use of the Dalkon device arose prepetition, even though the claimant's injuries did not manifest until later); JELD-WEN, Inc. v. Van Brunt (In re Grossman's Inc.), 607 F.3d 114, 125 (3d Cir. 2010) ("We . . . hold that a 'claim' arises when an individual is exposed pre-petition to a product or other conduct giving rise to an injury . . . . Applied to [asbestos creditors], it means that their claims arose . . . [on] the date [they] alleged that [the debtor's] product exposed [them] to asbestos.").

The FCR's role in this case, acting as a fiduciary, is to protect the rights of future claimants with valid claims against the Debtors, seeking to ensure that they are treated fairly in any trust and receive the same recovery and treatment as similarly situated present claimants. The FCR is adverse to the Debtors in seeking maximum funding for any trust. As recognized by the United States Supreme Court, although they both are creditor constituencies, the FCR is also adverse to the ACC in seeking to protect futures by ensuring, for example, the trust is not unfairly depleted by current claimants before future claimants can be paid. "In significant respects, the interests of those within the class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future." Amchem Products, Inc. v. Windsor, 521 U.S. 591, 626 (1997).

Because future claims are affected in the bankruptcy process but are, by necessity, unknown, the FCR, as their fiduciary and representative, must vote on their behalf to protect their interests, whether it be a regular Chapter 11 plan or a 524(g) plan. See 11 U.S.C. § 1126(a) ("The holder of a claim or interest allowed under section 502 of this title may accept or reject a plan."); 11 U.S.C. § 524(g)(2)(B)(IV)(bb) (requiring a 75% vote by claimants whose claims are to be addressed by a trust). The Debtors recognized this in their Motion for Solicitation and Confirmation Procedures: "However, because the identities of Future GST Asbestos Claimants will not be known before confirmation, the FCR who represents them must cast their Ballots. This is within the scope of the FCR's authority under the Court's order appointing him." Debtors Motion for Entry of an Order Approving Solicitation and Confirmation Procedures and Schedule, June 24, 2014 (Dkt. No. 3802), at 12 (citing FCR Appointment Order).

C. The Debtors' Prior Bar Date Motions for Asbestos Claims

In August 2010, the Debtors brought their first motion for an asbestos claims bar date. See First Bar Date Motion (Dkt. No. 461). In that motion, the Debtors sought a bar date for claimants who had sued Garlock in the tort system before the petition date and unknown persons who had not yet sued Garlock but whose injuries had manifested themselves before the bar date, i.e., current claimants. The Debtors cataloged the reasons for imposition of a bar date, stating, variously:

> Determination of the number and amount of claims is necessary for multiple purposes. First, it will determine how much Garlock must place into a Trust in order to fully fund its share, if any, of damages owed to claimants with pending tort system claims against Garlock and all potential future claimants. This Trust will assume Garlock's liability for asbestos claims; become responsible for paying all legitimate asbestos claims against Garlock; and will be the sole recourse for those claimants, who will be enjoined from pursuing Garlock after entry of a channeling injunction directing their claims to the Trust.
>
> Second, the number and amount of valid claims will determine whether the plan of reorganization Garlock will propose is confirmable. The true number and amount of asbestos claims will be relevant for a number of reasons, including voting, cramdown, feasibility, and the best interests of creditors test.

Id. at 13 (citations omitted).

The Debtors concluded that "[a] bar date is thus a necessary perquisite to determining the number and value of current claims in these Cases, which is itself essential to a fair confirmation of the plan of reorganization Garlock will propose. Without a bar date, the parties and the Court have no way of understanding which asbestos claimants are asserting bankruptcy claims against Garlock." Id. at 17.

The FCR agreed with the Debtors that a bar date is mandatory by reference to Rule 3003 and controlling Fourth Circuit precedent, namely the A.H. Robins case. See Future Asbestos Claimants' Representative's Omnibus Response to Debtors' Bar Date Motion, ACC's

Scheduling Motion, Debtors' Rust Consulting Motion, and Debtors' 2019 Motion, Oct. 7, 2010 (Dkt. No. 582), at 3. The FCR argued, however, that the First Bar Date Motion was premature and was not necessary for the Debtors to make their case at the estimation trial. Id. at 3-5. Instead, the Debtors could use discovery and expert testimony to support their argument that past settlement payments were not an accurate predictor of their current and future liabilities.

This Court denied the Debtors' First Bar Date Motion, but it did so expressly without prejudice to such motion being brought at a "later stage in these cases." Order on Motion of the Official Committee of Asbestos Personal Injury Claimants for Entry of a Scheduling Order and Debtors' Motion for Establishment of Asbestos Claims Bar Date, Etc., Dec. 9, 2010 (Dkt. No. 853), ¶ 2. The Court ruled that the Debtors should be permitted to undertake discovery to obtain asbestos claims data and other evidence needed to develop their estimation theories. Id. ¶ 3. The Court also "encouraged" the parties "to negotiate and, if possible, to develop an agreed protocol or method for identifying those pending asbestos-related claims for personal injury or wrongful death that may be considered abandoned or are otherwise no longer viable claims for purposes of estimate, plan formulation, voting on a plan, and distribution[.]" Id. ¶ 6.

The Debtors subsequently pursued the discovery proposed by the Court and received detailed personal injury questionnaires ("PIQs") from thousands of current mesothelioma claimants. The PIQs were limited to mesothelioma claimants in that all parties recognized that this case was driven by the Debtors' mesothelioma liabilities. Critically, however, for the purposes of this motion, the parties never reached an agreed protocol for identifying non-viable claims, the number and nature of which remain unknown.

Many mesothelioma claimants completed the PIQs, asserting exposure to Garlock's products. However, others in Garlock's database did not respond to the PIQ. See Third Bar

Date Motion (defined herein), at 6. Still others, more than 1,700 according to the Debtors, did not identify exposure to Garlock's products and thus would not have a basis for asserting an occupational exposure claim against the Debtors. Id. Further, while the PIQ process provided the Court with information concerning the current mesothelioma claims against Garlock where the disease manifested itself prepetition, the Court has no information regarding mesothelioma claims where the disease manifested itself post-petition. The Court also has no information concerning non-mesothelioma claims, which, according to the Debtors' database, total nearly 100,000 in number. Id.

In May 2011, the Debtors renewed their motion for a bar date for known claimants. See Renewal of and Second Amendment to Debtors' Motion for (A) Establishment of Asbestos Claims Bar Date, (B) Approval of Asbestos Proof of Claim Form, (C) Approval of Form and Manner of Notice, (D) Estimation of Asbestos Claims, and (E) Approval of Initial Case Management Schedule, May 3, 2011 (Dkt. No. 1310) (the "Second Bar Date Motion"). Therein, the Debtors argued that:

> The benefits of a bar date and proofs of claim are numerous and include the following: (a) proofs of claim filed by a bar date are mandatory under the Bankruptcy Code and necessary prior to estimation of claims under the Bankruptcy Code; (b) persons filing proofs of claim would become parties to these cases, subject to the jurisdiction of the Court and bound by the rulings the Court makes in these cases; and (c) given that a large number of open claims in the Debtors' claims database are old and dormant, the requirement that proofs of claim be filed would promote certainty regarding the identity of creditors participating in these Cases and would eliminate the need to estimate the Debtors' responsibility for claims that will never be asserted against the Debtors (as well as reduce the risk of an aggregate estimation inflated by such claims).

Id. ¶ 3.

Again the FCR's response did not challenge the Debtors' assertion that a bar date was mandatory or the benefits of a bar date. See Objection of Joseph W. Grier, III, Future Asbestos

Claimants' Representative, to Renewal of and Second Amendment to Debtors' Motion for (A) Establishment of Asbestos Claims Bar Date, (B) Approval of Asbestos Proof of Claim Form, (C) Approval of Form and Manner of Notice, (D) Estimation of Asbestos Claims, and (E) Approval of Initial Case Management Schedule, May 9, 2011 (Dkt. No. 1316), ¶¶ 3-5. Rather, the FCR simply objected anew that it was premature given the Court's earlier Order requiring the parties to conduct discovery, which had not been completed. Id. ¶ 4. Thus, consistent with that Order, the time for reconsidering denial of the First Bar Date Motion – the "later stage in these cases" – had not yet arrived.

This Court denied the Second Bar Date Motion without prejudice, explaining that there were no changes that warranted a different result and that the next step for the case was to be estimation of the Debtors' liability for mesothelioma claims, using the information obtained in discovery concerning current claims. See Order Denying the Second Amendment to Debtors' Motion for (A) Establishment of Asbestos Claims Bar Date, (B) Approval of Asbestos Proof of Claim Form, (C) Approval of Form and Manner of Notice, (D) Estimation of Asbestos Claims, and (E) Approval of Initial Case Management Schedule, May 19, 2011 (Dkt. No. 1348).

On December 30, 2013, just before the entry of the Estimation Order described below, the Debtors filed their third bar date motion. See Debtors' Renewed Motion for Asbestos Claims Bar Date and Related Relief, Dec. 30, 2013 (Dkt. No. 3279) (the "Third Bar Date Motion"). In the Third Bar Date Motion, the Debtors reiterated that "when claims are disputed, a bar date and proofs of claim are required by the Bankruptcy Code and Rules to identify creditors, to define the population of claimants who are entitled to vote on confirmation and participate in distributions of property under a plan, and for other purposes." Id. at 1.

This time, however, the Debtors sought to expand the bar date to not only claimants with existing diseases but, unusually, also to future claimants (i.e., claimants whose disease has not manifested at all). But as this Court has noted, such future claimants have no way of knowing whether they have a claim or not. See Estimation Order, ¶ 51 (noting the long latency period of asbestos diseases and why, when the disease is not immediate, the victim is not likely aware of the injury as it occurred and may not be able to specifically identify responsible tortfeasors). This is why the Court appointed the FCR to represent the interests of such future claimants. Before the FCR could respond to, or the Court could rule on, the Third Bar Date Motion, the Debtors withdrew it without explanation.

D. The Court's Estimate of Garlock's Mesothelioma Claims

On April 13, 2012, the Court entered its Order for Estimation of Mesothelioma Claims. (Dkt. No. 2102). In that Order, the Court stated that it would make "a reliable and reasonable estimate of the aggregate amount of money that Garlock will require to satisfy present and future mesothelioma claims." Id. ¶ 10. In July and August 2013, the Court held a 17-day trial on the estimation of Garlock's mesothelioma liabilities. On January 10, 2014, the Court entered the Estimation Order.

In the Estimation Order, the Court adopted the Debtors' estimate and "concluded that the amount sufficient to satisfy [the Debtors' liability for present and future mesothelioma claims] is $125 million," with $25 million for present claims and $100 million for future claims. Id. at 1 & ¶¶ 112-13. In the Estimation Order, the Court also found that Garlock's last ten years in the tort system "was infected by the manipulation of exposure evidence by plaintiffs and their lawyers," who the Court determined withheld evidence of exposure to other asbestos products and delayed filing claims against bankrupt defendants' asbestos trusts until after obtaining recoveries from

Garlock and other viable defendants. Id. ¶¶ 50, 58. The Court did not reach the issue of the Debtors' liability for non-mesothelioma claims or the amount of funding necessary to administer settlement and litigation trusts. Nor did the Court determine the amount of outstanding prepetition settled claims.

E. The Debtors' Bankruptcy Plan

Following the Estimation Order, the Debtors filed their First Amended Plan of Reorganization. Debtors' First Amended Plan of Reorganization, May 29, 2014 (Dkt. No. 3708) (the "Plan"). The Plan provides for $245 million for a trust that is to pay claimants who are willing to accept settled values proposed by the Debtors. This amount is for all settled asbestos claims, plus the cost of administering the settlement facility. In addition, the Plan allocates $30 million to a litigation fund for claimants who wish to litigate their claims in the tort system. This amount covers not only payments of any judgments or later settlements but also all defense costs. The Plan separately provides that the Debtors will pay allowed prepetition settlement claims in full. (The FCR reserves all rights with regard to the Estimation Order and the Debtors' Plan. However, whether that Plan as currently formulated or another plan proceeds to confirmation, a bar date remains mandatory and necessary in these cases.)

F. The Settled Claims Bar Date

In April of this year, the Debtors filed a motion for a bar date for settled claims, i.e., claimants who believed they were party to a binding prepetition settlement with the Debtors. Debtors' Motion for an Order (A) Establishing a Bar Date for Filing Settled GST Asbestos Claims, (B) Approving the Proof of Claim Form and (C) Approving the Form of and Procedures for Notice to Settled GST Asbestos Claims, Apr. 28, 2014 (Dkt. No. 3590).

A settlement bar date was necessary because some settlement agreements were known and not disputed but many others were known and disputed. Further, many mesothelioma claimants who submitted PIQs objected on the basis that their claims had been settled. Thus, the questionnaire process did not create certainty as to the number of settled claims or unliquidated claims for that matter. Critically, "that process did not resolve these issues, but was a discovery process with limited means of enforcement. The claimants who alleged settlements were never required to come forward with proof of their settlement or otherwise meet the Bankruptcy Code's requirements for making a claim." Id. at 7.

The FCR supported the Debtors' motion in that it brought certainty to the settled claims pool. In other words, for the exact reason the FCR brings this motion. See Future Asbestos Claimants' Representative's Response in Support of Debtors' Motion for an Order (A) Establishing a Bar Date for Filing Settled GST Asbestos Claims, (B) Approving the Proof of Claim Form and (C) Approving the Form of and Procedures for Notice to Settled GST Asbestos Claims, May 16, 2014 (Dkt. No. 3667).

The Court granted the motion and set the settled claims bar date for September 30, 2014. Order on Debtors' Motion to Establish Bar Date for Settled Asbestos Claims and Related Relief, July 9, 2014 (Dkt. No. 3854). That bar date served its express purpose. All parties now have a firm understanding of the total pool of settled claims asserted against the Debtors and can plan and act accordingly.

G. The Broken Promise of Asbestos Trusts

The FCR was aware at the beginning of these cases of the possibility that asbestos trusts, which have a lower threshold, legally and administratively, for paying claims as compared to the tort system, can be overwhelmed by unexpected current claims and then be left with limited funds to pay future claims. In fact, that is what happened to the very first asbestos trust, the Johns-Manville Trust, which started paying claims in 1988 at 100% of settlement values on a first-in, first-out basis but faced unexpected volumes of current claims. In just two years, Judge Weinstein had to issue a stay on trust payments. Later, he approved new trust distribution procedures that compensated unpaid current and future claimants for only 10% of their claims. Since then the payment percentage has been lowered to 7.5%.

What was not clear to the FCR was whether this problem of unequal treatment was isolated to Johns-Manville, which was unique in many ways, or whether it extended to other trusts, many of which came on line either just before or during the pendency of these cases. That question, however, has now been answered: the problem is acute and widespread. Professor Brown's 2013 article, entitled "How Long is Forever This Time? The Broken Promise of Bankruptcy Trusts," is a comprehensive and objective analysis of this issue. He reviewed public data available for 32 trusts for the period 2010 to 2013 and found that 20 reduced their payment percentages (i.e., the amount to be paid to futures) after significant monies had already been paid out to current claims. S. Todd Brown, How Long is Forever This Time? The Broken Promise of Bankruptcy Trusts. 61 Buff L. Rev. 537, Appendix A (2013) (attached hereto as **Exhibit A**). The reductions range from 9% to 93%, with a median reduction of 38%. Id. From 2007 to 2011, payments from bankruptcy trusts totaled $13.55 billion or 73% of the value of the assets remaining, assets which are supposed to last to pay future claimants for decades to come. Id. at 574. Professor Brown explained:

> Payments from the most recently established trusts declined as much as 90% following the initial claim processing period, and the median payment percentage across the trusts surveyed for this paper has reached an all-time low of 14%. Roughly two-thirds of the trusts have reduced payments to claimants at least once since 2010, resulting in per-claim payment reductions of up to 93.33% in that time. In sum, although trusts are established by the promise to pay all current and

> future victims equitably, this promise has already been broken at [sic] all but a few trusts.

Id. at 539.

Professor Brown attributes the broken promise of the asbestos trusts to the power given to a limited number of plaintiff firms, who, he argues, speak for the largest blocks of current claims, and dictate trust qualification criteria and settlement values, control key appointments, and structure trust governance provisions to preserve their influence over the trusts post-confirmation, with the result that they insist upon relaxed standards and inflated values for their own claims to the prejudice of future claims. Id. at 538.

The FCR acknowledges that three trusts did increase their payment percentage during that period – the two J.T. Thorpe Trusts and the Western Asbestos Settlement Trust. See id. at Appendix A. Under that scenario, top up payments can be made to previously compensated current claimants so all claimants receive a similar recovery for similar claims. But those trusts are distinguishable from other trusts. They have distribution procedures that depart significantly from the standard trust distribution procedures. The Western Asbestos Settlement Trust, for example, has, among other things, objective and transparent factors for valuing claims (age, deceased status, married status, dependents, lost earnings and pension, medical and funeral expenses, extent of exposure); refundable filing fees; requirements for the submission of credible reliable claim information; duration of exposure requirements; segregated funds for different diseases; and a 25% cap on contingency fees. The FCR in both cases is the highly respected former United States District Court judge and Deputy Attorney General of the United States, the Honorable Charles B. Renfrew.

Of course, when a trust reduces its payment percentage, it must have underestimated its long-term liabilities (often referred to as the "trust effect"), overestimated its projected assets, or both. It was believed, anecdotally, that across the board payment reductions in many trusts in recent years were caused by overestimations of assets because of the 2008 financial crisis. Professor Brown's analysis debunked that belief, noting that the trusts made back in gains in later years what they lost in 2008-2009. He concluded instead that the problem was one of squarely underestimating the number of claims that are submitted to, and paid by, the trusts:

> The recent surge in payment percentage reductions does not appear to be driven primarily by lingering investment losses associated with the recent financial crisis or significant increases in trust litigation and other expenses. Rather, these reductions reflect significant, lingering disparities in projected and actual claim submissions and payments in recent years. Indeed, where trusts have provided an explicit explanation for the payment percentage reductions, they have identified unexpected growth in claim submissions as a significant factor in these decisions.

Id. at 577.

On the occasions when trusts have explained the reason for the reductions, they identify unexpected claim submissions as the cause. For example, the C.E. Thurston Trust suspended making new offers in January 2012 due to claim filings significantly in excess of levels projected. Id. at 577 n.185. Similarly, when the UNR Trust lowered its payment percentage in 2011 to .82%, the Trust explained that it had experienced an unanticipated significant increase in claim filings. Id. Critically, as recently as October 15, 2014, the UNR Trust advised claimants that it was winding down after examining the Trust's increase in malignancy claim filings and projecting still further increased filings. The Trust, having paid out $266 million to 310,000 claimants since its inception, now only has $11.5 million left. Although the Trust was supposed to run through 2050, it will cease operation in 2019.

In sum, the trusts that reduce their payment percentages to the detriment of future claimants do so because they are unable to accurately project the volume of current claims that will be filed against the trust once it is up and running. There are multiple causes for the inability to project the "trust effect," including the structure of many trusts' distribution procedures, but one cause stands out: a lack of reliable data as to the pool of existing current claims before the payment percentage is set by the trusts. The most efficient and best way to obtain that data in advance is by a claims bar date.

H. The Debtors' Voting Solicitation Procedures and Notice Program

On June 24, 2014, the Debtors filed a Motion for Entry of an Order Approving Solicitation and Confirmation Procedures. (Dkt. No. 3802). That motion is scheduled to be heard on December 12, 2014. As part of that process, the Debtors have sought approval of an extensive and multimillion dollar notice program, recently discussed at the November 17, 2014 hearing. The Debtors propose soliciting votes of asbestos claimants at the same time as they give notice of their Plan and the confirmation hearing. During the hearing, the Debtors' notice expert, Ms. Kinsella testified that the program would not need to be modified to be sufficiently robust for a bar date notice. Hearing Transcript, Nov. 17, 2014 (Dkt. No. 4230), at 70:24-71:2. In fact, she confirmed it was designed to be that robust. Id. at 69:25-70:7.

In their proposed voting procedures, the Debtors require that claimants may only vote if they present evidence of exposure to asbestos from a Garlock product. In addition, the Debtors' ballots require a certification of disease. Thus, through the voting process, the Debtors require much of the information that would be required in a proof of claim and are noticing all current claimants. Because the identities of future claimants are not known, the FCR will cast their ballots, which is within the scope of the FCR's authority under the Court's Appointment Order.

V. LEGAL ARGUMENT

The Debtors have scheduled all asbestos claims that were pending on the petition date as disputed, contingent, or unliquidated, and dispute their liability for any other contingent and unliquidated claims that were not pending as of the petition date.

As the Debtors stated in their Third Bar Motion, so long as these claims remain disputed by a party in interest, a bar date and proofs of claim are mandatory before any plan can be submitted for confirmation. Third Bar Date Motion, at 1. See also In re A.H. Robins Co., 862 F.2d at 1095 (where claims are unliquidated and disputed, "it is necessary for the claimant to file a proof of claim" within the time fixed by the court) (citation omitted); S. Elizabeth Gibson, Judicial Management of Mass Tort Bankruptcy Cases 72 (Federal Judicial Center 2005) ("[T]he imposition of a bar date is mandatory.").

The result is no different because this is a mass tort case. See In re Hooker Invs., Inc., 937 F.2d 833, 840 (2d Cir. 1991) (a bar date order "does not function merely as a procedural gauntlet but as an integral part of the reorganization process") (quotation and citation omitted); In re Keene Corp., 188 B.R. 903, 907 (Bankr. S.D.N.Y. 1995) (bar date identifies claims and is an "integral part of reorganization process"); Vancouver Women's Health Collective Soc'y v. A.H. Robins Co., 820 F.2d 1359, 1360 (4th Cir. 1987) (mass tort case); In re Dow Corning Corp., 211 B.R. 545, 554 (Bankr. E.D. Mich. 1997) (mass tort case).

In various non-consensual asbestos bankruptcies, courts have set bar dates. See, e.g., In re USG Corp., 290 B.R. 223, 227 (D. Del. 2003); In re Babcock & Wilcox Co., No. 00-0558, slip op. at 7-8 (E.D. La. Oct. 30, 2000) (Docket No. 70); In re W.R. Grace & Co., No. 01-01139, Order as to All Pre-Petition Asbestos PI Litigation Claims, Including Settled Claims, (I) Establishing Bar Dates; (II) Approving Proof of Claim Form; and (III) Approving Notice of Pre-

Petition Asbestos Personal-Injury Claims Bar Date (Bankr. D. Del. Aug. 24, 2006) (Docket No. 13061).

A bar date, in addition to being required by law, will serve multiple important purposes in this case. Currently, the Court and the parties have no concrete information regarding the number of claims asserted for non-mesothelioma diseases, or the nature of those claims. Nearly 100,000 such cases were recorded as pending in the Debtors' database as of the petition date but most of those claims had been pending for many years. As such, there is great uncertainty as to whether such claims will be asserted here. If they are asserted, the impact on any trust will be significant. With respect to the population of mesothelioma claims subject to the PIQ, many claimants did not respond at all; others that did respond said they were not asserting claims; and still others did not identify any exposure to Garlock products in their PIQs or attachments. Thus, absent a bar date to determine the number of outstanding current claims, the Court will not be able to satisfy numerous Bankruptcy Code confirmation requirements by reference to the existing PIQs alone. See First Bar Date Motion, at 13. Nor, for that matter, will the parties be able to tailor various parts of the trust distribution procedures to fairly address a known pool of current claims.

A. Scope of Bar Date

The bar date should apply to claims known to the Debtors from their database. For these known claims, the Debtors have readily available means to contact claimants. The bar date should also apply to individuals who have manifested a disease at least one hundred eighty (180) days before entry of the bar date order. That will ensure that individuals who only recently manifested a disease or future claimants who have not manifested a disease at all will not be barred from asserting their claims.

B. Form of Proof of Claim

Form 10 of the Bankruptcy Rules is the standard proof of claim form, see Fed. R. Bankr. P. 3003(a), but the Court may alter the form where "appropriate." Fed. R. Bankr. P. 9009. Specialized proof of claim forms are often required in mass tort bankruptcy cases because of the need to obtain information about the nature of the claims asserted against the debtor. See, e.g., A.H. Robins Co., 862 F.2d at 1093; In re Babcock & Wilcox Co., No. 00-0558, Order Regarding Debtors' Motion for Entry of an Order Establishing a Bar Date, Approving the Proof of Claim Form, and Approving the Form and Manner of Notice (E.D. La. Oct. 30, 2000) (Docket No. 70).

Here, minimal changes are required. The Court can adopt part 5 of PIQ from this case, which concerns exposure to Garlock's products, and incorporate it in the proof of claim. The claimant will also need to identify his disease and attach a diagnosis. The proof of claim, therefore, will provide the basic information needed to identify and determine the number and nature of asbestos claims asserted against the Debtors and can run parallel with the balloting process, which seeks similar information. The FCR will, of course, engage the parties in an attempt to reach consensus as to the proof of claim form.

C. Notice of Bar Date

With regard to notice, the notice of the bar date can be included in the Debtors' notice for voting and confirmation, assuming that it is sent in the near future. That notice is already sufficiently robust for a bar date notice, and sending out one notice now will save significant administrative costs of having to do so later. The FCR has attached his proposed form of direct notice as **Exhibit B** and proposed form of publication notice as **Exhibit C**. The Debtors' notice agent, Ms. Kinsella, can implement the notice as already envisioned with regard to the balloting and confirmation notice and the FCR will coordinate with the Debtors to retain a claims agent to receive and process the proofs of claim. Given the upcoming holiday season, the FCR has set this motion for hearing on January 21, 2015. The FCR requests, however, that if the Debtors' notice of voting and confirmation is approved, it is held by the Debtors until this motion is ruled upon. Further, if the Debtors' notice of voting and confirmation is delayed for a significant period of time, the FCR reserves the right to request a separate notice program for an asbestos claims bar date.

D. Entry of Bar Date

For all these reasons, the FCR requests that the Court enter an order substantially in the form of **Exhibit D** ordering a bar date and proofs of claim. It would be reasonable, assuming this is to occur in not more than six months, that the bar date be on the same date as the ballot return deadline. Other courts have set bar dates one hundred eighty (180) days after entry of the bar date order. See, e.g., In re W.R. Grace & Co., No. 01-01139, Order as to All Pre-Petition Asbestos PI Litigation Claims, Including Settled Claims, (I) Establishing Bar Dates; (II) Approving Proof of Claim Form; and (III) Approving Notice of Pre-Petition Asbestos Personal-Injury Claims Bar Date (Aug. 24, 2006) (Docket No. 13061).

VI. CONCLUSION

For the foregoing reasons, the FCR respectfully request that the Court enter the proposed order setting an asbestos claims bar date, approving the proof of claim form, and approving the form and manner of notice.

[SIGNATURE ON FOLLOWING PAGE]

Dated: November 26, 2014

Respectfully submitted,

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ Jonathan P. Guy
Jonathan P. Guy
Kathleen A. Orr
1152 15th Street, NW
Washington, DC 20005
Telephone: (202) 339-8400
Email: jguy@orrick.com
korr@orrick.com

-and-

A. Cotten Wright (State Bar No. 28162)
Grier Furr & Crisp, PA
101 North Tryon Street, Suite 1240
Charlotte, NC 28246
Telephone: (704) 375-3720
Email: cwright@grierlaw.com

Counsel for Joseph W. Grier, III, Future Asbestos Claimants' Representative